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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1959

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. 44–45) is not reported. The opinions of the United States Court of Appeals for the Second Circuit (Pet. 46–48) are reported at 267 F. 2d 493.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1959 (Pet. 46). A timely petition for rehearing was denied on June 15, 1959 (Pet. 48). The petition for a writ of certiorari was filed on August 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Commodity Credit Corporation contracted to sell beans to petitioner for export within six months. The question presented is whether both courts below correctly construed the contract as imposing, as a condition of sale, that the beans be exported within six months, so that petitioner's failure to do so constituted a breach of contract which relieved the seller of any further obligation to make delivery.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition (Pet. 49–51).

STATEMENT

Respondent Commodity Credit Corporation ("Commodity") contracted to sell to petitioner some 210,000 sacks of dry baby lima beans, for export within six months (R. 5a–23a, 77a). When petitioner failed to export more than a small fraction of the beans within that period, Commodity notified petitioner that such failure was a material breach of the contract and that, accordingly, it was no longer obligated to deliver the remaining beans to petitioner (R. 55a). Petitioner thereupon instituted the present action for damages for breach of contract (R. 3a–4a). The district court granted summary judgment in favor of Commodity (Pet. 44–45), and the court of appeals unanimously affirmed (Pet. 46–48).

The contract between petitioner and Commodity consists of a telegraphic bid, a telegraphic acceptance, and a confirmation of sale (R. 5a, 77a, 109a). The bid and the confirmation incorporated by reference

the terms and conditions of a Department of Agriculture announcement of sale (No. GRT 318), and a supplement thereto (R. 5a, 77a).[1]

The announcement, which was captioned "Sale of Dry Edible Beans for Export," declared that buyers of the beans would be required, within 60 days, to "cause exportation of the identical beans delivered hereunder by CCC to a foreign country (territories and possessions of the United States are excluded)" (*infra*, pp. 10, 14). Delivery was to be made "FAS at the port or FOB car or truck at the border point specified in buyer's bid" (*infra*, p. 10). Title and risk were to pass "at the time the beans are loaded onto railroad cars or trucks for shipment to port or border point" (*infra*, p. 13).

Section 4 of the announcement provided that, "if the buyer fails to take delivery [for export within the contract period,] title * * * shall pass to the buyer in store in the warehouse where the beans are then located, upon acceptance by the buyer of the draft for payment of the amount due as provided hereafter in this Section 4. Such in store sale shall be for unrestricted use" (*infra*, p. 11). The section further provided that petitioner would be obligated to pay for the beans at a price higher than if it received them for export (*infra*, p. 11).

The supplement similarly stated that Commodity was offering certain beans "for sale for export" (*infra*, p. 15). It declared that "consideration may be given to bids for beans moved to new export

[1] The relevant provisions of the announcement and the supplement are set forth in the appendix, pp. 10–16, *infra*.

markets," but that, if the bidder did not state a specific country of destination, it would be assumed "that the beans are for export to established markets" (*infra*, p. 16).

Petitioner telegraphed a bid for the purchase of the beans which stated that, "to effectuate the export of such large quantities" of beans "without disturbance of foreign markets," it would need more than 60 days to complete shipments abroad (R. 77a). In accepting petitioner's bid, Commodity declared that the "entire quantity [of beans was] to be exported within 180 days from Sept. 14, 1955" (R. 5a).

By March 16, 1955, the expiration of the 180-day period, petitioner had given shipping instructions for, and Commodity had delivered, only 28,805 of the 210,000 sacks of beans (R. 28a, 50a).[2] On that date, Commodity notified petitioner that its failure to export all the beans was a material breach of the contract and that, accordingly, Commodity was under no obligation to deliver the remaining sacks (R. 55a). Petitioner then instituted the present action against Commodity for damages for breach of contract (R. 3a–4a). Its theory was that, by virtue of section 4 of the announcement (*supra*, p. 3), title to the beans had automatically passed to petitioner upon the expiration of the 180-day period, and that, therefore, Commodity was obligated, upon demand, to deliver

[2] On March 8 and 9, Commodity's contracting officer had received shipping instructions for an additional 13,300 sacks of beans. Commodity, however, rejected these instructions (as authorized by section 3 of GRT 318) on the ground that they were not received in time to make delivery to meet vessel schedules (*infra*, p. 11; R. 28a, 96a–97a).

the beans for petitioner's unrestricted use (R. 3a–4a).[3]

In entering summary judgment for Commodity, the district court rejected petitioner's theory that under the contract "it had the right to purchase the beans for export at a certain price and, at its option, for domestic sale at a higher price" (Pet. 43). The court ruled (Pet. 44) that "the contract was not an absolute sale of the beans by defendant to plaintiff regardless of whether plaintiff exported them or sold them in the domestic market." It construed section 4 as merely giving Commodity the option to require petitioner to accept the beans in-store at the higher price (*ibid.*).

The Court of Appeals affirmed in a brief *per curiam* opinion (Pet. 46–47). It held that the "contract for the sale of beans to plaintiff 'for export' imposed on the buyer an obligation to export that was of the essence. The contract bristles with provisions, both general and specific, pointing up this purpose so sharply that it can be ignored only on pain of impalement" (Pet. 47). The court ruled that section 4 "does not convert the contract into one effecting an absolute sale, with the buyer free to exercise an option not to export merely on the payment of a premium."

[3] Commodity counterclaimed, alleging that petitioner had breached the contract by failing to submit shipping instructions covering the export of the beans within the contract period (R. 26a–29a). The district court entered summary judgment against Commodity on the counterclaim on the ground that, since Commodity had not exercised its option to require petitioner to accept the beans in-store, it could not claim a breach for nonacceptance (Pet. App. 45). Commodity did not appeal the ruling.

Rather, the court continued, the in-store sale provisions "define certain consequences of the buyer's failure, consequences that could be available only by contract" and "there is nothing to suggest * * * that these consequences are exclusive" or that, by including them in the contract, Commodity "has contracted away the usual contract remedy of rescission" (Pet. 47). The court concluded (*ibid.*) that, "[b]y failing to make timely arrangements for the export of 85% of the beans sold to it for export, the plaintiff committed a material breach of contract justifying rescission by the defendant."[4]

ARGUMENT

Contrary to petitioner's contention (Pet. 10–12, 36–40), this case presents no statutory issues or important questions of contract law. It involves only the construction of the particular contract, and has no significance beyond this immediate case.[5] We submit that both courts below correctly held that the contract required petitioner, as a condition of the sale, to export the beans within the specified period and entitled Commodity, upon petitioner's failure to do so, to refuse to make further deliveries. Review by this Court is not warranted.

[4] In denying rehearing the court, although conceding that its prior reference to "rescission" was "technically inapposite [n]evertheless * * * adhere[d] to the position that the contractural provisions defining consequences of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of further obligation to perform" (Pet. 48).

[5] We have been advised by the Department of Agriculture that the particular form of contract here involved is no longer in use and that there is no other pending litigation concerning its construction.

1. Read as a whole, the contract clearly shows that the obligation to export within the stipulated period was, as the court of appeals stated (Pet. 47), "of the essence." The contract stipulated that this was a sale of dry edible beans "for export" (*infra*, p. 10), and petitioner assumed an obligation to "cause exportation of the * * * beans" (*infra*, p. 14). The invitation for bids stated that consideration would be given to bids proposing to move the beans "to new export markets," but that if no country of destination were listed in the bid it would be assumed "that the beans are for export to established markets" (*infra*, p. 16). Commodity was to make delivery "FAS at * * * port or FOB car or truck at * * * border point" (*infra*, p. 10). Title and risk were to pass when the beans were loaded "for shipment to port or border point" (*infra*, p. 13). Indeed, petitioner expressly recognized that the sale of the beans was conditioned on their being exported. For it sought an additional period for shipment, in order "to effectuate the export of such large quantities" of beans "without disturbance of foreign markets" (R. 77a).

2. Petitioner contends (Pet. 22–26), however, that under the contract the exclusive remedy for failure to export the beans within 180 days was for Commodity to tender the beans to it pursuant to section 4 of the announcement; and that it, therefore, had the right to take title to the unexported beans for unrestricted use, including domestic disposition, merely by paying the higher price.

We submit that the courts below correctly rejected this unwarranted construction of the contract. Since

the purpose of Commodity's purchasing and storing operations is to stabilize the domestic market, it would be anomalous if the contract left it to the purchaser to decide whether the beans should be introduced into that market. On the contrary, as the district court ruled (Pet. 44), the contract gave Commodity the power to make that decision, and here, "[t]o discharge its purpose of stabilizing the domestic market, defendant chose not to permit plaintiff to sell the beans in the domestic market."

A specific remedy in a contract is not exclusive "unless the language of the part of the agreement in question, or of the entire agreement, together with other relevant evidence, if any, shows a contrary intent."[8] Neither the agreement itself, nor anything in the record, shows that section 4 was intended to provide an exclusive remedy. On the contrary, it provided that an additional remedy "plainly is for the benefit of the vendor" which "may be insisted upon or waived at his choice." *Stewart* v. *Griffith*, 217 U.S. 323, 329; *Western Union Telegraph Co.* v. *Brown*, 253 U.S. 101, 111; *Salant* v. *Fox*, 271 Fed. 449 (C.A. 3). Here, Commodity did not exercise its additional remedy, but instead treated petitioner's non-performance as a breach of contract which terminated its obligation to make further deliveries.

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[8] *Roth* v. *Hartl*, 365 Pa. 428, 75 A. 2d 583, 586; *Kilsheimer* v. *Ross & Moskowitz*, 257 F. 2d 242, 245 (C.A. 2); *Biscayne Shores, Inc.* v. *Cook*, 67 F. 2d 144, 145 (C.A. 3); *Randall* v. *Douglass*, 321 Mich. 492, 32 N.W. 2d 721; *Leeper* v. *Murdock*, 168 Tenn. 192, 76 S.W. 2d 335; *Asia Investment Co.* v. *Levin*, 118 Wash. 620, 204 Pac. 808. See *Plimpton* v. *Mattakeunk Cabin Colony*, 9 F. Supp. 288 (D. Conn.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1959.

APPENDIX

Announcement GRT 318 (June 27, 1955), Department of Agriculture:

SALE OF DRY EDIBLE BEANS FOR EXPORT

The U.S. Department of Agriculture announces the contemplated sale by the Commodity Credit Corporation (hereinafter referred to as "CCC") of certain of its stocks of dry edible beans for export. * * *

* * * * * * *

3. *Delivery and marking.* The buyer shall furnish to CCC shipping instructions in time to permit delivery of the beans to the buyer and his exportation thereof within 60 calendar days after the date of CCC's acceptance of the buyer's bid or within any written extension by CCC of such period. CCC will deliver the beans FAS at the port or FOB car or truck at the border point specified in buyer's bid, upon receipt by the CSS Commodity Office designated in CCC's acceptance of the buyer's bid of complete written shipping instructions and after completion of financial arrangements in accordance with Section 7 hereof. Shipping instructions must include at least the following and such additional information as CCC may require in the appropriate supplement to this announcement:

For FAS port

1. Name of port.
2. Name of vessel.
3. Name of steamship company.
4. Receiving dates of vessel.
5. Name and address of forwarder or agent to be notified, if any.

For FOB car or truck at a border point

1. Name of border point.

2. Name and address of forwarder, consignee, or agent to be notified, if any.

Shipping instructions may be rejected if in the opinion of CCC they are not received in time to make delivery to meet vessel schedules. Any wharf demurrage will be for the account of the buyer except in the case of delay on the part of CCC.

Any marking will be for the account of the buyer. Marking instructions may be furnished direct to the warehouseman or may be furnished to CCC together with the shipping instructions.

4. *Failure to take delivery—default.* If the buyer fails to take delivery of the beans within 60 calendar days from CCC's acceptance of buyer's bid, or any written extension by CCC of such 60-day period, it is agreed by the parties hereto that title and risk of loss, damage, or deterioration to the beans shall pass to the buyer in store in the warehouse where the beans are then located, upon acceptance by the buyer of the draft for payment of the amount due as provided hereafter in this Section 4. Such in store sale shall be for unrestricted use and the sales price of the beans shall be the higher of the following:

(a) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid,

(b) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or

(c) if no such sales price as described in (b) has been announced, the domestic market price, as determined by CCC, in effect on such date.

Settlement for the sales price under this section shall be on the basis of the official grades shown on the inspection certificates and 100 pounds net per bag without adjustment for actual weights. The total amount due under this section shall be the amount of such sales price plus any unpaid storage or other charges for which the buyer may be liable.

If the financial arrangement made by the buyer in accordance with section 7 hereof is by irrevocable letter of credit, a draft, supported by a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office as provided in such section, will be drawn by CCC against the full amount of the letter of credit in partial payment of the amount due CCC. If the financial arrangement made by the buyer is by deposit of cash or a certified or cashier's check, CCC will apply the full amount thereof in partial payment of the amount due.

The balance of the amount due CCC shall be covered by a sight draft drawn by CCC upon the buyer and supported by the warehouse receipts and official grade inspection certificates for the beans.

In the event that the buyer fails to honor such sight draft, CCC may terminate his rights under the in store sale because of his default and sell the beans for his account either on a bid or negotiated basis, for the best price obtainable as determined by CCC. The proceeds of such sale shall be applied against the amount due by the buyer under this section. The remainder of such amount shall be collected by CCC applying the funds in its hands accruing from the financial arrangements made by the buyer, and any deficiency shall be paid by the buyer. Any balance of such funds shall be refunded to the buyer.

* * * * *

6. *Title and Risk of Loss, Damage or Deterioration.* Title and all risk of loss, damage

or deterioration shall pass to the buyer at the time the beans are loaded onto railroad cars or trucks for shipment to port or border point: *Provided,* that where the buyer fails to take delivery within the time specified in section 4 hereof, title and risk of loss, damage or deterioration shall pass to the buyer "in store" as provided in such section.

7. *Financial arrangements.* (a) Financial arrangements in an amount equal to the total number of bags purchased times the unit price stated in the buyer's bid and acceptance by CCC shall be made within 10 calendar days after the date of acceptance of the buyer's bid by CCC or by the time first shipping instructions are received by CCC, whichever is earlier. Such financial arrangements shall be made, with the CSS Commodity Office designated in CCC's acceptance of the buyer's bid, by payment in cash, by certified or cashier's check, or by establishment of an irrevocable commercial letter of credit acceptable to CCC. In order to be acceptable, a letter of credit must (a) be effective for not less than 90 days; (b) provide for payment at sight and be payable at par; (c) must provide that drafts drawn by CCC may be supported by either: (1) an invoice, inspection certificates, official weight certificates or commodity examination reports, and bills of lading or (2) a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office, stating the amount due CCC on an in store sale of the beans for unrestricted use resulting from the buyers' failure to take delivery of the beans within 60 calendar days after the date of CCC's acceptance of the buyers' bid or any written extension by CCC of such period.

(b) If the buyer fails to make financial arrangements in accordance with Section 7(a), CCC shall have the right to deem the buyer in default and to avail itself of any remedy available to it. The buyer shall be liable to

CCC for any loss or damage resulting from such default.

8. *Export requirements.* (a) The buyer shall, within 60 calendar days from the date of CCC's acceptance of the buyer's bid, or within such extension or extensions of that period as may be authorized by CCC in writing before or after expiration of such 60 calendar day period, cause exportation of the identical beans delivered hereunder by CCC to a foreign country (territories and possessions of the United States are excluded). The buyer shall, within 30 calendar days after exportation of the beans, furnish to CCC proof of such exportation as specified in section 9 hereof. Failure of the buyer to furnish CCC proof of exportation within 90 calendar days after the date of CCC's acceptance of the buyer's bid, or, in the case of extension of the time for export, within 30 calendar days from the last date for exportation under such extension, shall constitute prima facie evidence of failure to export.

(b) If the buyer does not cause exportation of the identical beans delivered hereunder by CCC within the period specified in (a) of this section, or if exportation is made and any of the beans exported are reentered into the United States, or any of its territories or possessions, whether or not such reentry is caused by the buyer, the sales price with respect to the quantity which is reentered or not so exported shall be adjusted upward by the amount that such sales price is exceeded by the higher of (1) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid, or (2) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or, if no such sales price has been announced, the domestic market price as determined by CCC,

in effect on such date. The total amount of any upward adjustment in sales price arising under this Section shall be paid by the buyer to CCC promptly upon demand. Any such upward adjustment of sales price will be waived to the extent that the Vice President of CCC, or his designated representative, finds that failure to export, as specified in (a) of this section, (1) was due to unforeseeable causes beyond the control, and without the fault or negligence, of the buyer, and that such quantity of beans was, pursuant to written approval of CCC, subsequently actually exported to a foreign country within the time specified in writing by CCC, or (2) was the result of its loss, damage, destruction, or deterioration and that the physical condition thereof is such that its entry into domestic market channels will not impair CCC's price support operations.

* * * * *

Portland Supplement #1 (~~June~~ July 6, 1955) to Announcement GRT-318:

SALE OF DRY EDIBLE BEANS FOR EXPORT

Pursuant to the terms and conditions of Announcement GRT-318, dated June 27, 1955, the U.S. Department of Agriculture (CCC) offers for sale for export certain of its stock, as available, of 1954 crop beans on a bid and acceptance basis. Approximate quantities, classes and export ports applicable to the beans offered are shown on the attached Scheduled A. * * *

* * * * * *

The terms and conditions of Announcement GRT-318, dated June 27, 1955, this supplement and the confirmation of sale executed by CCC and the buyer, shall constitute the entire contract between the buyer and CCC. Any special terms or conditions, not covered herein or under Announcement GRT-318, will be stated in

the confirmation of sale which will govern with respect to such special terms and conditions.

As consideration may be given to bids for beans moving to new export markets the specific country of destination, if known, should be stated in the bid. If a specific country is not stated CCC will assume that the beans are for export to established markets.

* * * * *